Supreme Court, U.S.
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No. 06-278

In The Supreme Court of the United States

JUNEAU SCHOOL BOARD AND DEBORAH MORSE,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(Restated to conform to the facts found in the decision below).

1. Whether the First Amendment allows public schools to punish students for displaying messages off school property, at events not sponsored by the school or supervised by the school, when a school official deems the message contrary to school policy even though there is no disruption of the educational process.

2. Whether the court of appeals properly denied qualified immunity to a public high school principal who violated clearly-established law under the First Amendment by suspending a student for constitutionally protected speech, off-campus, that Petitioners admit did not disrupt or interfere with school activities.

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COUNTER-STATEMENT OF THE CASE

The actual facts of this case are hard to recognize from Petitioners' statement. On numerous points, they have misstated facts and ignored other critical facts.

This case started when several persons, some students and some not, displayed a banner on a public sidewalk across a street from the high school. App. 2a, 4a; C.A. ER 35, 40, 41. Petitioners erroneously claim that the events took place "on school grounds," Pet. at 5, n.3, but then admit that the banner was unfurled outside school grounds. Pet. at 6. The banner, which read "Bong Hits 4 Jesus," was displayed as the Winter Olympic Torch Relay came along the adjacent street.[1] The relay was a commercially sponsored event sponsored by the local Coca-Cola dealer. The school district was not a sponsor, App. 2a, although the nearby high school had allowed teachers, at their option, to release students from class to watch the relay.[2]

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[1] Petitioners claim the *persons* holding the banner were all students, Pet. at 6; it was actually a mix of students and non-students. App. 4a; C.A. ER 40. Petitioners claim that the banner was twenty feet long, a fact they admit is not in the record. Pet. at 6. In fact it was fourteen feet long [measurement of original banner by Respondent's counsel].

[2] Petitioners erroneously call the relay a "school sponsored" event. In the trial court, with different counsel, the Petitioners admitted the relay was not sponsored by the school but called student attendance "school sanctioned." Petitioners also erroneously call the event "teacher supervised," but the court of appeals cited uncontradicted evidence that although some teachers were present, there was no real supervision and students were not required to remain with teachers or remain on site; some students simply left campus, contrary to Petitioners' assertion that students were required to remain on campus. App. 4a. No permission slips were required, as would be the case with field trips.

(Continued on following page)

One of the persons holding the banner, 18 year-old Joseph Frederick, was a student at the high school but had not been in school earlier that day. App. 2a, 4a. He arrived at the site where the banner was unfurled without stepping on school grounds. App. 2a. When the banner was unfurled, the high school principal, Deborah Morse, left school grounds, crossed the street, demanded that the people holding the banner put it down, and then grabbed it and crumpled it. App. 2a. Frederick asked about his First Amendment rights, and Morse told him the banner violated school policy against offensive materials. App. 3a.

Morse then told him to come to her office in the high school. Frederick collected his books from his car, checked in with the teacher in his next class to tell him he had to go to the office, and was just going to the office when an assistant principal came to find him.[3] App. 25a; ER 35. Morse suspended Frederick from school for five days. According to Frederick, he then quoted Thomas Jefferson on civil liberties to her, whereupon she gave him an additional five day suspension.[4] App. 3a; C.A. ER 35, 16 (at 108).

App. 12a. Petitioners also claim that Mr. Frederick was participating in an "approved social event." Pet. at 24. In fact, the relay itself was not "approved" by the school, App. 4a; to the extent that Mr. Frederick's presence at the relay could be described as a "social event," it was not one organized by the school. In its opinion, the court of appeals described the event as "school authorized," App. 7a, a phrase that Petitioners do not use. Read in context, however, the phrase "school authorized" simply means that the school "authorized" its teachers to allow their students to attend the privately sponsored event, not that the event was authorized or sponsored by the school.

[3] The School District claims he came only when the assistant principal arrived to get him.

[4] Morse claimed she could not remember whether this happened or not. App. 3a.

In defending its actions, the School District claimed that the banner conveyed a pro-drug message. Mr. Frederick testified otherwise. He explained that the banner was not intended to be a drug reference, but was meant as a meaningless and humorous phrase that might attract the attention of the TV cameras in front of the relay. App. 4a; C.A. ER 35, ER 16 (at 57-59), ER 41. He also presented numerous witnesses who said they did not take it as a pro-drug reference but only as a funny saying.[5] C.A. ER 16 (at 57-59), ER 41. The District admitted that it received no complaints at all from persons taking the banner as referring to drugs and could produce no one who read it as a drug message except the principal.

The court of appeals ultimately found it unnecessary to characterize the banner's message with precision. Even accepting the School District's characterization – despite the absence of supporting evidence in the record – the court of appeals noted that "it is not easy to distinguish speech about marijuana from political speech in the context of a state where referenda regarding marijuana legalization repeatedly occur and a controversial state court decision on the topic had recently issued." App. 9a.

The Petition also claims, again with no citation to the record, that the principal was confronting a "disruptive" situation. Pet. at 23. In fact, there was some disruption near the school before the banner was unfurled when other students began throwing snowballs and Coke bottles handed out by the relay sponsors, but the people holding

[5] Frederick presented evidence that the phrase was used as a brand slogan on snowboards and as the name of a group that appeared annually at the New Orleans Mardi Gras to parody religious protestors against that event. C.A. ER 35.

the banner were not part of any disruption. App. 2a. The Petitioners do not even claim that the banner display caused disruption. To the contrary, they admitted below that the banner incident caused no disruption in the school's educational program.[6] App. 3a, 6a; C.A. ER 31.

As the lower court correctly noted, "the principal did not rip down the sign at the rally because she anticipated or was concerned about [disruptive] consequences." App. 2a. Rather, the principal's concern was that the banner's message, at least as she construed it, was inconsistent with the school's educational mission. App. 6a. In her mind, that was enough to tear down the banner and suspend Frederick from school, even though the banner was displayed off-campus.

After his ten-day suspension was upheld by the School Board, Frederick filed suit in federal district court, seeking injunctive and monetary relief for a violation of the First Amendment to the U.S. Constitution, as well as for a violation of state civil rights laws. App. 4a. The district court initially dismissed the case, but that ruling was reversed by the court of appeals in a unanimous opinion written by Judge Kleinfeld.

As the court of appeals succinctly summarized its holding: "a school cannot punish students' speech merely because the students advocate a position contrary to government policy." App. 8a. In reaching that conclusion, the court of appeals carefully considered and applied this

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[6] In response to an interrogatory asking how the banner disrupted the work of the school, the school district responded, "Defendants do not contend that display of the banner disrupted classroom work." C.A. ER 31.

Court's decisions in *Tinker v. Des Moines Indep. School District,* 393 U.S. 503 (1969), *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260 (1988), and *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986).

Having determined that Respondent's First Amendment rights were violated, the court of appeals then ruled that Petitioner Morse was not entitled to qualified immunity because she either knew or should have known that Respondent's suspension was inconsistent with clearly-established law. App. 19a, 20a. Reconsideration was denied, also unanimously, and a petition for en banc hearing failed to garner a single vote. [Court of Appeals Order, April 18, 2006].

REASONS WHY THE PETITION SHOULD BE DENIED

The petition seeks a writ of *certiorari* based on a factual scenario that is not presented in this case and on a legal issue over which there is no circuit split. Petitioners, who provide a broad survey of student clothing rules limiting advertisements and images related to alcohol, tobacco and other drugs, and who dwell at length on cases involving student clothing, apparently are eager for the Court to make an expansive pronouncement that school districts enjoy great latitude in prohibiting students' "pro-drug" statements while on school grounds.

This case, however, simply does not present that question. Respondent's speech did not occur on campus, did not occur at a school-sponsored event, and did not cause any disruption of the educational process. Based on those actual facts, the holding below is a narrow one, and

fully consistent with this Court's controlling precedents. It is petitioners who seek to change the law based on an idiosyncratic set of facts and without any clearly demonstrated need. This Court should decline that invitation.

1. The facts of this case simply do not present the issues on which petitioners seek certiorari. Petitioners have miscast the facts and ruling below to give the impression that it squarely presents an issue of school authority over drugs. It does not.

a. The events of this case lie at the farthest margin of a school's authority. The facts here bear no resemblance to any of the student speech cases cited by Petitioners and are wholly distinct from circumstances normally faced by school officials. Mr. Frederick, who had not set foot on school grounds, joined with non-students in a location off school property at an event neither sponsored nor meaningfully supervised by the school. Only by conjuring a dramatically different set of facts can Petitioners create an imagined need for review by this Court. Any ruling on these facts will have little practical application beyond this case.

b. It is uncontested that Mr. Frederick was not on campus when the event occurred. And, contrary to Petitioners' artful stretching of the term "sponsored," the court of appeals found that the relay itself was not school sponsored, the Petitioners themselves admitted it below, and there is no dispute that Mr. Frederick's expression was not itself school-sponsored. Despite Petitioners' best efforts to suggest otherwise, this case does not present the issue of school authority over student expressions on campus or in a school-sponsored activity.

c. Even assuming that issue were fairly presented by these facts, which it is not, Petitioners' legal theory has no limits and cannot be reconciled with this Court's nuanced approach to student speech issues. As the court of appeals stated:

> By [Petitioners'] standard, distributing photocopies of the Alaska Supreme Court decision in *Ravin v. State,* in which it declared that there is "no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of marijuana," [citation omitted], would also undermine the school's anti-drug mission. However, it could not seriously be contended that handing out copies of *Ravin* on the sidewalk across the street from the school while students were released from school could be prohibited.

App. at 17a, n.44.

2. There is no conflict among the circuits. Clearly, the Petitioners disagree with the decision below. But there is no basis for their claim that the decision below creates a conflict among the courts of appeals that now requires resolution by this Court.

a. Petitioners cite only a single court of appeals case in which punishment for a display – wearing a t-shirt with a rock band's logo – was sustained merely because the display could be taken as advocating drug use, without a showing of an actual disruptive effect on education, *Boroff v. Van Wert City Board of Education,* 220 F.3d 465 (6th Cir. 2000). However, *Boroff* was substantially limited by a later Sixth Circuit decision, *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001), in which the court found that there must be a showing of actual disruptive effect before a school could ban an arguably racist

t-shirt that offended some students. Moreover, both *Boroff* and *Castorina* involved on-campus activity, which this case does not, a critical distinction that Petitioners consistently obscure.[7]

There are no other appellate decisions that even arguably differ from the decision in this case. The decision below has been cited favorably in two other Ninth Circuit cases, *Pinard v. Clatskanie School District 6J,* 446 F.3d 964 (9th Cir. 2006); and *Harper v. Poway Unified School Dist.*, 445 F.3d 1166 (9th Cir. 2006), and in a recent Second Circuit case, *Guiles v. Marineau*, 2006 WL 2499083, ___ F.3d ___ (2nd Cir. Aug. 30, 2006). There have been no cases critical of the decision below. In addition, numerous courts of appeals cases have adopted the same analysis of student free speech cases that the Ninth Circuit applied here, including *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001). These courts have rejected the notion that a student's expression can be suppressed or punished as "offensive" under *Fraser* merely because it involves a reference to drugs.

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[7] The court of appeals in this case noted that the *Boroff* t-shirt was worn in class, "where its message would be more likely to interfere with the school's core educational mission. Frederick's banner, by comparison, was displayed outside the classroom, across the street from the school, during a non-curricular activity that was at most only partially supervised by school officials. It most certainly did not interfere with the school's basic educational mission." App. at 17a.

b. Petitioners cite several district court cases for the proposition that drug references may be banned in schools, but none referring to off-campus drug references. Among the in-school cases they cited, *Guiles v. Marineau*, 349 F. Supp. 2d 871 (D.Vt. 2004), was reversed, *op. cit.*, and *Barber v. Dearborn Public Schools*, 286 F. Supp. 2d 847 (E.D. Mich. 2003), holds the opposite of what Petitioners claim – it supports punishment of school-sponsored drug references by students under *Fraser* but makes clear that outside of school-sponsored speech, *Tinker* controls and requires a material disruption of classwork or substantial disorder before the speech can be punished, citing *Hazelwood Sch. Dist. v. Kuhlmeier*, *op. cit.* In addition, Petitioners cite *Gano v. School District No. 411*, 674 F. Supp. 796 (D. Idaho 1987) for the holding that t-shirts showing drunken administrators can be punished under *Fraser*, but the depiction at issue in *Gano* was banned not because it fostered alcohol use but because of its false depiction of administrators as drunk on school grounds.

Surprisingly, the Petitioners also cite *McIntire v. Bethel School Board*, 804 F. Supp. 1415 (W.D. Okl. 1992), for the proposition that it is reasonable to link a positive image of alcohol with future school disruptions. In fact, that decision refused to apply *Fraser* and enjoined school officials from banning a t-shirt because they could not show any disruption at the school. The court further held that there is no justification for applying *Fraser* when the only grounds advanced by school officials is that the references to alcohol "are inconsistent with the school's mission of teaching students about the effects of alcoholic beverages . . . and that alcohol consumption by minors is illegal." *Id.* at 1426-1427. In short, *McIntire* directly rejects the Petitioners' main argument here.

3. There is no immediate need to address any issue here. Although Petitioners would have the Court believe that this decision has caused a crisis among schools throughout the nation by disturbing a settled expectation about pre-existing law, nothing could be farther from the truth. Judge Kleinfeld methodically applied long-settled precedent to an uncommon set of facts, arriving at a logical and predictable holding for a situation that seldom arises.

a. The ruling below is consistent with decades of established law. For the past twenty years, school districts, as well as their administrators and students, have operated under this Court's triumvirate of student discipline cases: *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), and *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

The court of appeals recognized these three cases, outlined the situations when each applies, and held that *Tinker* covers Frederick's speech. In so holding, the court emphasized that Frederick's speech was conveyed off-campus and was not sponsored by the school (and therefore *Kuhlmeier* did not apply), was not "plainly offensive" (and therefore *Fraser* did not apply), and was not disruptive (and therefore was constitutionally protected under *Tinker*).

b. Few other courts have even noted this decision, and none has ruled contrary to it. As noted above, the opinion has been cited by two other Ninth Circuit panels and more recently by the Second Circuit, but none of these courts has disagreed with the decision or criticized it.

There has been no questioning of the opinion by other judges, let alone direct conflict from other federal courts. There is a good reason for this broad consensus.

> Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood* [*v. Kuhlmeier*], a school may regulate school sponsored speech. . . . Speech falling outside of these categories is subject to *Tinker*'s general rule. . . .[8]

And, *Tinker*'s rule is clear:

> Schools may not regulate such student speech unless it would materially and substantially disrupt classwork and discipline in the school.

393 U.S. at 513.

c. This case arises in a unique factual setting that is not likely to recur: a student who had not been to school that day joined with non-students to display a banner, off school grounds, with a political message utilizing parody, during an event that was not sponsored by the school but which students were allowed to leave school and watch. Such idiosyncratic facts simply do not provide an appropriate vehicle for this Court's review of First Amendment rules that have been well-settled for nearly two decades.

d. Nor is there any other reason that the opinion should be expected to alarm public school districts. Petitioners suggest that many schools have policies on clothing that ban drug, tobacco and alcohol images and

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[8] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.), *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992).

advertisements. However, Petitioners seriously mischaracterize the breadth of the ruling below and the existing school policies when they claim that schools across the nation have rules that will be put in jeopardy by Judge Kleinfeld's opinion. Indeed, the court of appeals was careful to note that its holding was limited to the particular facts before it. ("We do not reach the question of whether the school could have prohibited Frederick from displaying his banner on school grounds or wearing a t-shirt that read "Bong Hits 4 Jesus.") App. 17a.

At the very least, it is premature for this Court to grant review based on Petitioners' speculation about unforeseen consequences flowing from the decision below that have not materialized and that the court of appeals neither intended nor anticipated.

4. The court of appeals correctly denied qualified immunity based on this Court's well-established jurisprudence. Petitioners' complaint about being denied qualified immunity is result-oriented and not based in fact. Indeed, the court of appeals employed this Court's test for qualified immunity, applied the facts in the record to Supreme Court and court of appeals precedent, and appropriately denied qualified immunity. While Petitioners disagree with the outcome, they do not seriously take issue with the court of appeals' methodology for denying qualified immunity.

a. Judge Kleinfeld's qualified immunity analysis flows from a verbatim quote from *Saucier v. Katz*, 533 U.S. 194 (2001), altering only individual words for application to the facts of the case: "First, we must determine whether the 'facts alleged show [Morse's] conduct violated a constitutional right. Second, we must determine whether the

right was clearly-established at the time of the alleged violation. Finally, we must determine "whether it would be clear to a reasonable [principal] that [her] conduct was unlawful in the situation [she] confronted." App. 18a-19a (quoting *Saucier*, 533 U.S. at 201-02); *see also Lawrence v. Reed*, 406 F.3d 1224, 1230 (10th Cir. 2005) (applying the three-part *Saucier* test); *Limone v. Condon*, 372 F.3d 39, 44 (1st Cir. 2004) (same); *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003) (same).

b. The court of appeals then applied that framework to the facts of this case in straightforward fashion. First, the court held that Frederick's First Amendment rights had been violated when he was suspended from school for off-campus speech in the absence of any evidence that his expression had caused a "substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. Second, the court held that the *Tinker* standard was "clearly established" at the time of Frederick's suspension. Finally, the court held that a reasonable principal in Morse's shoes would have understood that Frederick's suspension was unlawful under *Tinker*. None of those holdings is surprising or exceptional.

c. Indeed, Respondent Morse would have been a particularly unlikely individual to receive a shield of qualified immunity. Not only did she admit to being actually aware of *Tinker*, *Fraser*, and *Kuhlmeier* from her graduate school training, App. 20a, but Frederick explicitly referenced his First Amendment rights upon being suspended. App. 3a. Respondent is not aware of any cases where an official received qualified immunity after the official is found to have violated a plaintiff's constitutional right, the official admits she had previously studied the relevant precedent, and the plaintiff had apprised the

official of the constitutional violation at the time of her action. As Judge Kleinfeld recognized, "[t]he law was clear, and Morse was aware of it." App. 21a.

d. Finally, Petitioners' novel claim that they are automatically entitled to qualified immunity based on an initial decision in their favor by the district court that was later reversed by the court of appeals does not warrant review by this Court. If Petitioners were correct, then a grant of qualified immunity could never be reversed, and the district court would effectively become the final decisionmaker on qualified immunity issues. That is plainly not the law.

CONCLUSION

For the reasons stated above, the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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